

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALICIA CABRERA)	
Claimant)	
VS.)	
)	
CASCO, INC.)	Docket No. 228,987
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the April 28, 2000 Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Appeals Board heard oral argument on September 8, 2000, in Wichita, Kansas.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for claimant. Douglas D. Johnson of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a series of accidents and mini-traumas that resulted in bilateral upper extremity injuries and bilateral wrist surgeries. Claimant initially alleged that the traumas began in September 1997 and continued each workday thereafter. Judge Barnes found that the appropriate accident date for computing claimant's benefits was July 21, 1998, which the parties do not dispute.

In the April 28, 2000 Award, which is the subject of this appeal, Judge Barnes found that claimant had sustained a 77.78 percent task loss and a 30 percent wage loss, which

created a 54 percent permanent partial general disability. Therefore, the Judge awarded claimant benefits for a four percent permanent partial general disability followed by a 54 percent work disability.

Respondent and its insurance carrier contend Judge Barnes erred. They contend that claimant's permanent partial general disability rating should be four percent, which was the whole body functional impairment rating provided by Dr. J. Mark Melhorn. They argue that claimant returned to work for respondent following bilateral wrist surgeries and successfully worked until the plant closed in April 1999. They also argue that claimant has not searched for a job since the plant closed. Therefore, respondent and its insurance carrier contend that the last wage that claimant was earning while working for respondent should be imputed, which would limit claimant's permanent partial general disability to the whole body functional impairment rating.¹

Conversely, claimant contends the Award should either be affirmed or the permanent partial general disability increased to 88.89 percent. Claimant contends the Judge should not have imputed a \$240 per week post-injury wage for purposes of the permanent partial general disability formula. Instead, claimant argues that the Judge should have found that she was unemployed and, therefore, had a 100 percent wage loss. Claimant also contends that because of these upper extremity injuries she has a 14 percent whole body functional impairment, which is the rating provided by claimant's medical expert Dr. Pedro A. Murati.

The only issue before the Appeals Board on this review is the nature and extent of claimant's injuries and disability.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. Claimant began working for respondent in 1991. While working as a machine operator, claimant injured her neck and underwent surgery. That accident is the subject of Docket #198,074, which has also been decided this date. In approximately June 1997, claimant returned to work for respondent in an accommodated position. Because of repetitively cutting excess plastic from parts, claimant sustained a series of mini-traumas to her hands and wrists that resulted in overuse injuries to both upper extremities.
2. Respondent referred claimant to Dr. J. Mark Melhorn, who treated claimant from March 1998 until releasing her in late September 1998. Dr. Melhorn diagnosed and eventually operated on both of claimant's wrists for de Quervain's, which the doctor

¹ See K.S.A. 1998 Supp. 44-510e.

described as a form of tendinitis at the base of the thumb. The doctor released claimant to return to regular work but with task rotation.

3. Respondent accommodated claimant's injuries and restrictions and returned her to work. Claimant continued working for respondent through April 30, 1999, when the plant closed. While continuing to work for respondent, claimant earned a wage comparable to, or more than, her pre-injury wage.

4. During May 1999, claimant began receiving unemployment benefits. To enhance her odds of obtaining employment, in July 1999 claimant began taking English classes through the unemployment office as her native language is Spanish. Once those courses began, the unemployment office suspended the requirement that claimant actively seek employment. When claimant last testified in July 1999, she was unemployed and anticipating that the English classes would continue through January 2000.

5. In November 1998, Dr. Pedro A. Murati examined claimant at her attorney's request to evaluate claimant's upper extremities and low back.² Dr. Murati diagnosed the following:

Right hand pain secondary to status post De Quervain's release; left hand pain secondary to status post De Quervain's release; lumbosacral strain; probable right carpal tunnel syndrome; probable left carpal tunnel syndrome.³

6. Dr. Murati recommended that claimant receive additional treatment for both the low back and the wrists. Using the fourth edition of the *AMA Guides to the Evaluation of Permanent Impairment* (the *Guides*), the doctor rated claimant as having a 14 percent whole body functional impairment due to the upper extremity injuries.

Because of the upper extremity injuries, Dr. Murati believes that claimant should avoid work that requires heavy or repetitive grasping; repetitive hand controls; climbing ladders; hooks, knives, or vibratory tools. The doctor would also limit claimant from lifting more than 20 pounds occasionally, 10 pounds frequently, and five pounds constantly.

7. Claimant hired vocational expert Karen Crist Terrill to prepare a list of work tasks that claimant had performed in the 15 years before developing the upper extremity injuries. Dr. Murati reviewed Ms. Terrill's task list and found that claimant could not perform seven of nine, or 78 percent, of her former tasks due to the bilateral upper extremity injuries.

² The doctor did not evaluate claimant's neck, which is the subject of Docket #198,074. The low back was evaluated as it was, or became, the subject of Docket #198,074 and Docket #234,374.

³ Deposition of Pedro A. Murati, M.D., April 28, 1999; pp. 9, 10.

8. Respondent and its insurance carrier presented Dr. Melhorn's testimony. Using the *Guides*, Dr. Melhorn rated claimant as having a four percent whole person functional impairment. Dr. Melhorn was not asked if claimant should refrain from performing any of her former work tasks.

9. Claimant deposed Ms. Terrill, who testified that claimant retained the ability to earn \$6 per hour (or \$240 per week) in the open labor market as compared to claimant's pre-injury average weekly wage of \$344.61.

10. The Appeals Board finds and concludes that claimant has sustained a 78 percent task loss as the result of the upper extremity injuries. The Board also finds that claimant has a 100 percent difference in her actual pre- and post-injury wages. The Appeals Board averages Dr. Murati's 14 percent whole body functional impairment rating with Dr. Melhorn's four percent rating and finds that claimant has sustained a nine percent whole body functional impairment due to the upper extremity injuries.

CONCLUSIONS OF LAW

1. The April 28, 2000 Award should be modified. As explained below, the Appeals Board concludes that claimant has a nine percent permanent partial general disability through April 30, 1999, followed by an 89 percent permanent partial general disability. Further, a credit should be applied for any permanent partial disability benefits from Docket #198,074 that overlap with the permanent partial general disability benefits awarded in this proceeding.

2. Claimant's bilateral upper extremity injuries arose out of and in the course of employment with respondent.

3. Because bilateral arm injuries comprise an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1998 Supp. 44-510e. That statute provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee

is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*⁴ and *Copeland*.⁵ In *Foulk*, the Court of Appeals held that a worker could not avoid the conclusive presumption against having a work disability, as contained in K.S.A. 1988 Supp. 44-510e, by refusing to return to accommodated work for the employer and perform an accommodated job that paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wages should be based upon his or her ability to earn rather than the actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injuries.

If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .⁶

4. Through April 30, 1999, claimant's permanent partial general disability is limited to the nine percent whole body functional impairment rating as she continued to work for respondent at a wage comparable to her pre-injury wages.

5. Kansas law is well-settled that placing an injured worker in an accommodated position artificially avoids or suspends a work disability (a disability greater than the functional impairment rating) by allowing the worker to perform work for a comparable wage. But once the accommodated job ends, the work disability is no longer suspended.⁷

When claimant was laid off, she lost her accommodated job. Claimant is now left to search for other work in the open labor market with work restrictions and limitations from both the earlier neck injury and the bilateral upper extremity injuries, both of which have limited the type of work that claimant can now do.

Therefore, for the period commencing May 1, 1999, claimant should receive permanent partial general disability benefits for the higher of the work disability or functional impairment.

⁴ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

⁵ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁶ *Copeland*, p. 320.

⁷ *Surls v. Saginaw Quarries, Inc.*, 27 Kan. App. 2d 90, 998 P.2d 514 (2000).

6. The Appeals Board finds that claimant has satisfied the requirement that she make a good faith effort to find appropriate employment. When claimant last testified in July 1999, she was taking English classes, which would hopefully increase her employment opportunities. Because of those classes, which claimant contemplated continuing through January 2000, the unemployment office temporarily suspended the requirement that claimant actively seek work. But before the unemployment office suspended that requirement, claimant was regularly contacting employers and seeking work. The Board concludes that the English classes were part of claimant's job search process and, therefore, claimant was exercising good faith while attending those classes. Therefore, the 100 percent actual wage loss should be used in the permanent partial general disability formula.

7. Averaging the 100 percent wage loss with claimant's 78 percent task loss yields an 89 percent permanent partial general disability. Therefore, as of May 1, 1999, the permanent partial general disability rating increases from nine percent to 89 percent. The Board notes that the award may be modified upon claimant completing English classes and obtaining employment, or if she fails to continue with a good faith job search.

8. The Workers Compensation Act provides that awards are to be reduced by the percentage of contribution that an earlier compensable disability contributes to the overall disability. The Act reads:

(a) If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workers compensation act, and suffers a later injury, compensation payable for any permanent total or partial disability for such later injury shall be reduced, as provided in subsection (b) of this section, **by the percentage of contribution that the prior disability contributes to the overall disability** following the later injury. **The reduction shall be made only if the resulting permanent total or partial disability was contributed to by a prior disability** and if compensation was actually paid or is collectible for such prior disability. . . .⁸
(Emphasis added.)

9. As determined in Docket #198,074, claimant's neck injury resulted in permanent medical restrictions and the loss of ability to perform 30 percent of former work tasks. As a result of that neck injury, claimant was restricted from lifting more than 35 pounds occasionally, 25 pounds frequently, and 10 pounds constantly. Further, claimant was limited to no more than occasional overhead reaching activities and was required to avoid prolonged or repetitive flexion-extension activities with the neck.

⁸ K.S.A. 44-510a.

But because of the upper extremity injuries, claimant must avoid work that requires heavy or repetitive grasping; repetitive hand controls; climbing ladders; hooks, knives, and vibratory tools. Additionally, claimant must now limit lifting to no more than 20 pounds occasionally, 10 pounds frequently, and five pounds constantly.

The Appeals Board concludes that the upper extremity injuries prohibit some of the same job tasks that the neck injury prohibited. Further, the Board finds that the neck injury is a significant factor in claimant's inability to find appropriate employment. Therefore, the Board concludes that the neck injury has contributed 100 percent to claimant's ultimate 89 percent permanent partial general disability.

Pursuant to the above credit statute, claimant's benefits should be reduced based upon a 100 percent contribution for any weeks that the permanent partial disability benefits from Docket #198,074 overlap with the permanent partial general disability benefits awarded in this claim. Therefore, respondent and its insurance carrier are entitled to a weekly credit in the sum of \$188.61 for the period from May 1, 1999, through May 1, 2003, making the permanent partial disability payment \$41.14 per week for that period.

10. The Appeals Board adopts the findings and conclusions made in the Orders executed this date in Docket #198,074 and Docket #234,374.

AWARD

WHEREFORE, the Appeals Board modifies the April 28, 2000 Award. Claimant is entitled to receive benefits for a nine percent permanent partial general disability for the period through April 30, 1999, followed by an 89 percent permanent partial general disability. Further, respondent and its insurance carrier are entitled to a K.S.A. 44-510a credit for any weeks that the permanent partial disability benefits from Docket #198,074 overlap with the permanent partial general disability benefits awarded in this claim.

Alicia Cabrera is granted compensation from Casco, Inc., and its insurance carrier for a July 21, 1998 accident and resulting disability. Based upon an average weekly wage of \$344.61, Ms. Cabrera is entitled to receive 37.35 weeks of permanent partial disability benefits at \$229.75 per week, or \$8,581.16, for a nine percent permanent partial general disability for the period from July 21, 1998, through April 9, 1999.

For the period of May 1, 1999, through May 1, 2003, Ms. Cabrera is entitled to receive 208.86 weeks of permanent partial disability benefits at \$41.14 per week (\$229.75 - \$188.61), or \$8,592.50, and commencing May 2, 2003, Ms. Cabrera is entitled to receive an additional 123.14 weeks of permanent partial disability benefits at \$229.75 per week, or \$28,291.42, for the 89 percent permanent partial general disability. The total award is \$45,465.08.

As of November 30, 2000, there is due and owing to the claimant 120.21 weeks of permanent partial general disability compensation, for a total due and owing of \$11,990.02, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$33,475.06 shall be paid as set forth above until satisfied or further order of the Director.

The Appeals Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority's finding that there is a 100 percent contribution from the disability caused by the earlier neck injury, which is the subject of Docket #198,074, to the disability caused by the bilateral upper extremity injuries. I find that the evidence is insufficient to show how the neck injury has contributed to the upper extremity injuries or the disability from those injuries. Because respondent and its insurance carrier failed in its burden of proof, the award should not be reduced by a K.S.A. 44-510a credit. I agree with the other findings and conclusions.

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
Douglas D. Johnson, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director